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No. 08-403

In the Supreme Court of the United States

ROY F. BRUNO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the fact that certain property is currency must be suppressed in a civil forfeiture action when the currency is the property to be forfeited and it was seized in violation of the Fourth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-22) is reported at 518 F.3d 1159. The order of the district court (Pet. App. 23-43) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 2008. A petition for rehearing was denied on July 3, 2008 (Pet. App. 44-45). The petition for a writ of certiorari was filed on September 25, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In November 2003, the United States filed an *in rem* action in the United States District Court for the District of Arizona seeking civil forfeiture pursuant to 18 U.S.C. 981(a)(1)(A) and (B) and 21 U.S.C. 881(a)(6) of

currency discovered in a roadside search of a pickup truck. The complaint alleged that the currency had been used in or was intended to be used in an illegal drug transaction. The district court entered an order forfeiting the funds. Pet. App. 23-43; Compl. 1, 12. The court of appeals affirmed. Pet. App. 1-22.

1. On June 3, 2003, Officer John McFarland of the Arizona Highway Patrol stopped a pickup truck driving near Phoenix, Arizona, for veering outside of its lane. The truck's driver was Miguel Camacho; petitioner was his passenger. Officer McFarland approached the truck and noticed the strong smell of air freshener coming from the cabin. He knew from his experience that air freshener is often used to hide the smell of drugs. Officer McFarland asked Camacho to walk back with him to the patrol car so they could talk, and Officer McFarland asked Camacho about his travel plans. Officer McFarland then returned to the truck and asked petitioner about his travel plans, receiving a response that was inconsistent in certain respects from the account given by Camacho. Pet. App. 2; Suppression Order ¶¶ 5-9.

Officer McFarland ultimately issued Camacho a warning ticket and told him that he was free to leave. As Camacho walked back to his truck, Officer McFarland called him over and asked if he had any drugs or large amounts of money in the truck. Camacho answered in the negative, and he gave Officer McFarland permission to deploy his drug-sniffing dog on the truck's exterior. The dog alerted to the scent of narcotics on the truck, and Officer McFarland and other officers searched the truck. They found just under $500,000 in currency, most of it wrapped in cellophane and hidden in a secret compartment of an auxiliary fuel tank. Pet.

App. 2-3; Suppression Order ¶¶ 9-11; Gov't Am. Statement of Facts ¶¶ 28-52.

2. Federal and state officials in Florida had been investigating Camacho for some time for smuggling cocaine from Mexico into the United States. Their investigation produced evidence that Camacho initially stored the cocaine that he smuggled at a ranch near the Mexico-United States border and that he primarily would use family members (like petitioner, whose wife is Camacho's niece) to transport the cocaine throughout this country. The investigation further revealed that Camacho would personally drive large amounts of cash to Mexico to pay the drug traffickers who transported the cocaine from Colombia, and that the pickup truck Camacho was driving when stopped in Arizona had been seen at his residence in Miami. That residence, the evidence showed, contains a hidden facility capable of storing 1000 kilograms of cocaine, the volume of cocaine that Camacho told a government informant that he sells every 15-20 days in Miami. Pet. App. 3-4, 30, 36-38.

3. The government brought this civil action seeking forfeiture of the truck and the currency. Camacho filed a claim to the truck, petitioner filed a claim to the currency, and all parties consented to proceeding before a magistrate judge. Pet. App. 3.

Petitioner and Camacho then moved to suppress the evidence from the traffic stop claiming that the search and seizure violated the Fourth and Fourteenth Amendments. The district court held that Officer McFarland lawfully stopped Camacho for traffic violations and lawfully detained him until the issuance of the warning ticket. The district court held, however, that Officer McFarland's continued detention of Camacho beyond that point was unreasonable under the Fourth Amend-

ment. The court therefore suppressed the evidence gathered after Officer McFarland issued the warning ticket. Pet. App. 3, 24.

After discovery, the government moved for summary judgment based on two independent types of evidence: (1) petitioner's and Camacho's responses to the government's requests for admissions; and (2) affidavits describing the government's investigation of Camacho's drug-trafficking activities and Officer McFarland's observations at the traffic stop before issuing the warning ticket. See Pet. App. 33. The government argued that each type of proof established the forfeitability of the currency on several bases: the currency had been used or was intended to be used to buy controlled substances, see 21 U.S.C. 881(a)(6); it was traceable to the proceeds of drug-trafficking or felony offenses against a foreign nation, see 18 U.S.C. 981(a)(1)(B); and it was laundered from criminal transactions, see 18 U.S.C. 981(a)(1)(A). Compl. 1. The district court concluded that each of the government's evidentiary bases warranted entry of summary judgment for the government.

a. First, the court held that petitioner's answer to the government's request for admissions was inadequate and, therefore, that the subjects of the request were deemed admitted under Federal Rule of Civil Procedure 36(a). Pet. App. 40. That Rule provided that a party's request for admission of a matter is deemed granted unless the opposing party timely responds with an answer or objection that is "addressed to the matter" of the request and either "specifically den[ies] it or state[s] in detail" why an answer cannot be provided. Fed. R. Civ. P. 36(a) (2005). The party who requested the admissions may then move the district court "to determine the sufficiency of the answers," and the court, if it "de-

termines that an answer does not comply with the requirements of [Rule 36]," may "order either that the matter is admitted or that an amended answer be served." *Ibid.*

The district court explained that the government had asked the court to determine the sufficiency of petitioner's answer to the government's request for admissions and that the court had concluded that petitioner's "blanket assertion of the Fifth Amendment" was improper because not all of the requests would incriminate petitioner. Pet. App. 39-40. The court also noted that it could "draw a negative inference from the invocation of the Fifth Amendment in this civil proceeding." *Id.* at 40 (citing *Baxter* v. *Palmigiano*, 425 U.S. 308, 318-320 (1976)). The court thus held that "invoking the Fifth Amendment as to all of the requests * * * is an insufficient response under Rule 36, * * * and the requests for admissions must be deemed admitted." *Ibid.* Among other things, the government's request had asked petitioner to admit that the defendant currency constitutes the proceeds of illegal sales of controlled substances and that petitioner placed the currency in Camacho's truck to be used for the unlawful purchase of controlled substances. *Id.* at 38-39; Gov't Am. Statement of Facts ¶¶ 65-69.

b. Second, the district court concluded that the government presented sufficient evidence unaffected by the Fourth Amendment violation because the government's affidavits were based on independently obtained information showing that any currency transported by Camacho or petitioner in Camacho's truck was, more likely than not, the purchase money for or the proceeds of an illegal drug transaction. See Pet. App. 41-42. Petitioner contended, however, that the suppression order

prevented the court from considering that the defendant *res* is, in fact, "currency." Pet. Resp. to Pl.'s Am. Second Summ. J. Mot. 14. Petitioner thus argued that the court must instead treat the *res* as a "featureless widget" that could not be connected to drug activity and therefore could not be proved forfeited. *Ibid.*; see also *id.* at 18.

The court rejected that argument. The court acknowledged that the *res* itself could be excluded from evidence and, for that reason, certain aspects of the currency, such as the denominations of the bills, might not be admissible. Pet. App. 34. But the court held that it could still consider the basic identity of the *res* as currency. *Ibid.* It reasoned that, if it could not consider what the *res* is, the government would be left the logically impossible task of proving that an object about which nothing is known satisfies a standard for forfeiture. *Ibid.*

The district court accordingly considered that the *res* was currency and held that the government's affidavits "prove[] by a preponderance of the evidence a substantial connection between the defendant[] and cocaine purchases and sales, *i.e.*, that the defendant money is proceeds of cocaine sales and/or intended to be furnished to buy additional cocaine." Pet. App. 41. The court noted that petitioner "ha[d] not submitted any disputed facts in opposition to the Motion for Summary Judgment" (*id.* at 36) and that the facts in the government's proffer were therefore uncontested (*id.* at 41). Because there was no dispute of material fact as to the government's burden, and because petitioner offered no evidence that he was an innocent owner, the court ordered the defendant currency forfeited to the United States. *Id.* at 42-43.

4. The court of appeals affirmed. Pet. App. 1-22. As relevant here, petitioner argued that the district court had improperly "considered the fact that the illegally seized *res* consisted of a large amount of United States currency." Pet. C.A. Br. 23. The court of appeals did not decide whether the district court had in fact considered the currency's value, holding instead that any such reliance would have been harmless because the government's untainted evidence satisfied its burden of proof. Pet. App. 22. Specifically, the court held that the government's untainted affidavits "overwhelming[ly]" establish that petitioner and Camacho were traveling in furtherance of their cocaine trade and that any currency in their possession was thus more likely than not the product of or the intended purchase money for an illegal drug transaction "regardless of the amount of currency at issue." *Id.* at 20-21.

The court of appeals rejected petitioner's argument that the Fourth Amendment violation required the court to treat the defendant *res* as a "featureless widget" and ignore its identity as "currency." Pet. App. 10. The court reasoned that to treat an illegally seized *res* as featureless would be to eviscerate the well-accepted principle that "the mere fact of the illegal seizure, standing alone, does not immunize the goods from forfeiture." *Id.* at 10 (quoting *United States* v. *One 1977 Mercedes Benz*, 708 F.2d 444, 450 (9th Cir. 1983), cert. denied, 464 U.S. 1071 (1984)). The court of appeals accordingly held that, "when the illegally seized *res* in a civil forfeiture proceeding consists of currency, * * * courts may not introduce [the] currency into evidence or consider its amount, [but] courts may recognize that [the] illegally seized property consists of currency." *Id.* at 11.

ARGUMENT

Petitioner contends that, where a court presides over a civil forfeiture proceeding in which the defendant property (the *res*) consists of currency that was seized in violation of the Fourth Amendment, the court may not "properly consider the character of [that] property," *i.e.*, "that [the property] is currency." Pet. i. In petitioner's view (Pet. 5-21), a court in such circumstances must instead treat the defendant *res* "as nothing more than a 'featureless widget'" (Pet. 3) because the unlawful search that preceded the forfeiture proceedings "allowed the government not only to seize th[e] property, but to identify it" as money (Pet. 16). The court of appeals correctly rejected that claim. No further review is warranted.

1. a. This Court in *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693 (1965) (*Plymouth Sedan*), held that the Fourth Amendment exclusionary rule applies in forfeiture cases. The Court explained that its holding was consistent with prior statements of the Court that recognize that the government may keep unlawfully seized contraband (such as narcotics and unregistered alcohol stills) even though that property would be inadmissible as evidence in criminal proceedings. *Plymouth Sedan*, 380 U.S. at 698-699. That result, the Court concluded, reflected recognition of the illegal "character" and "nature of [such] property" as contraband per se. *Id.* at 699-700. But, the Court concluded, because the automobile in *Plymouth Sedan* was "not intrinsically illegal in character," the sedan was subject to forfeiture only if the State could "establish [its] illegal use without using the evidence resulting from the search" of the sedan (*i.e.*, cases of liquor lacking state tax seals). *Ibid.*

Plymouth Sedan supports the view that the "character" and "nature" of property may be considered in contexts where that property is seized unlawfully. Had the Court concluded that unlawfully seized property (*e.g.*, illegal narcotics) must be deemed to be a "featureless widget," the government would be unable to maintain possession of such property in proceedings seeking the property's return.

Moreover, *Plymouth Sedan* implicitly recognized that, even if an item (*e.g.*, the sedan) is unlawfully seized, such that evidence resulting from the seizure is excludable, untainted evidence can justify forfeiture by connecting the item to an unlawful use. See 380 U.S. at 699. That recognition also defeats petitioner's claim. If courts were required to treat a *res* (there, the sedan; here, the currency) as an abstract "widget" about which nothing is known, it would be impossible to connect that *res* to any activity, even with untainted evidence.

This Court subsequently has confirmed that a fact-finder is not required to ignore the basic identity of a defendant that the government has unlawfully seized. That rule follows from the principle that an unconstitutional seizure does not impair a court's power to try a defendant. See *Gerstein* v. *Pugh*, 420 U.S. 103, 119 (1975); see also *Frisbie* v. *Collins*, 342 U.S. 519, 522 (1952). A necessary corollary of the ability to try an illegally seized defendant is the ability to recognize the defendant's identity. The five concurring Justices in *United States* v. *Crews*, 445 U.S. 463 (1980), accordingly agreed that a defendant's face is not a suppressible fruit of his illegal arrest, such that he can be identified by his face at trial. *Id.* at 477 (Powell, J., concurring); *id.* at 478-479 (White, J., concurring). As Justice White explained, "[a] holding that a defendant's face can be con-

sidered evidence suppressible for no reason other than that the defendant's presence in the courtroom is the fruit of an illegal arrest would be tantamount to holding that an illegal arrest effectively insulates one from conviction for any crime where an in-court identification is essential." *Id.* at 478.

That logic applies equally when the defendant *res* in forfeiture proceedings consists of property that was unlawfully seized. Indeed, in *INS* v. *Lopez-Mendoza*, 468 U.S. 1032 (1984), the Court recognized that the "identity of a defendant * * * in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest" and that a "similar rule applies in forfeiture proceedings directed against * * * forfeitable property." *Id.* at 1039-1040 (citing cases).

b. The court of appeals' holding that the district court properly considered that the *res* in this case is "currency" is fully consistent with those principles, and petitioner fails to identify any conflict between that holding and the decisions of this Court. He relies (Pet. 17-18) on a footnote in *Crews* recognizing that "[i]n some cases, of course, prosecution may effectively be foreclosed by the absence of the challenged evidence." 445 U.S. at 474 n.20. But the decision below is not to the contrary. The court of appeals recognized that suppressing the fruits of an unlawful search will sometimes prevent the government from establishing an item's forfeitability. See Pet. App. 9 (noting that such was the case in *United States* v. *$191,910*, 16 F.3d 1051 (9th Cir. 1994)). Clearly, in cases where the government's only evidence of an item's forfeitability is tainted by the unlawful search itself, the government will be unable to prove that forfeiture is warranted.

Petitioner's rule, however, is much broader and would depart from the footnote in *Crews*, as extended to forfeiture proceedings. Under petitioner's rule, defects in the seizure of an item would not just prevent its forfeiture "in some cases" (*Crews*, 445 U.S. at 474 n.20)—it would prevent the item's forfeiture in *every* case. The government could not show that a "featureless widget" about which nothing is known can satisfy any standard of forfeiture. Petitioner does not even attempt to explain how the court of appeals erred in concluding that his proposed rule would eviscerate the recognized principle that unlawfully seized property is not immune from forfeiture. Pet. 13-18.

2. Petitioner's contention (Pet. 7-13) that the court of appeals' decision reflects a split of authority among the courts of appeals is similarly misplaced. As petitioner correctly recognizes (Pet. 7), the First and D.C. Circuits are in accord with the decision below. See *United States* v. *$36,634*, 103 F.3d 1048, 1052 n.3 (1st Cir. 1997); *United States* v. *$639,558*, 955 F.2d 712, 715 n.5 (D.C. Cir. 1992). No other court of appeals has held otherwise.

Neither of the Eighth Circuit cases that petitioner cites (Pet. 8-9) conflicts with the decision of the court of appeals. In the first case, the court simply held that a particular search was constitutional because it was based on a search warrant supported by probable cause. *United States* v. *$12,390*, 956 F.2d 801, 807 (8th Cir. 1992).[1] The other decision simply states that the exclu-

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[1] Petitioner calls attention to the Eighth Circuit's statement, in dicta, that "the forfeitable items would not be inadmissible even if they had been seized in violation of the Fourth Amendment." *$12,390*, 956 F.2d at 806. The court supported that dicta by citing this Court's observation in *Lopez-Mendoza* that "the identity of a defendant" in a forfeiture

sionary rule applies to forfeiture proceedings; it does not suggest that that rule requires that a defendant *res* be treated as a featureless widget. *United States* v. *$7850*, 7 F.3d 1355, 1357 (1993). To the contrary, the court cited *Lopez-Mendoza*, affirmed that "the 'identity' of a defendant is not itself suppressible as fruit of an unlawful search," *ibid.* (quoting 468 U.S. at 1039-1040), and limited its holding to the conclusion that the seizure of the *res* in that case was not consensual. *Id.* at 1359.

Petitioner's reliance (Pet. 9) on Fifth Circuit decisions is similarly unavailing. In *United States* v. *Monkey*, 725 F.2d 1007, 1012 (5th Cir. 1984), the court assumed that marijuana sweepings found on an illegally seized fishing vessel (the *Monkey*) could not be used to prove that the vessel was involved in drug trafficking and therefore forfeitable. The court, however, held that other evidence established forfeitability. *Ibid.* Even if the court's assumption were a holding, it would be entirely consistent with the court of appeals' decision in this case. See Pet. App. 11 (court may not rely on the amount of the currency to prove its forfeitability); accord *$36,634*, 103 F.3d at 1052 n.3 (court may not rely on the scent of unlawfully seized currency to prove its forfeitability). Both *Monkey* and *United States* v. *One 1978 Mercedes Benz*, 711 F.2d 1297 (5th Cir. 1983), like the court of appeals in this case, make clear that an "improper seizure does not jeopardize the government's right to secure forfeiture" if the right to forfeiture is "supported with untainted evidence." *Monkey*, 725 F.2d

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case may be considered even if the item was unlawfully seized. See *ibid.* (citing 468 U.S. at 1039-1040). Whatever the scope of that dicta, it can create no conflict with the court of appeals' challenged holding in this case.

at 1012 (quoting *One 1978 Mercedes Benz*, 711 F.2d at 1303); Pet. App. 10-11, 22.

Finally, the Second and Tenth Circuit decisions cited by petitioner (Pet. 9-11) merely hold that the particular searches in those cases were constitutional. *United States* v. *$557,933.89*, 287 F.3d 66, 80 (2d Cir. 2002); *United States* v. *$149,442.43*, 965 F.2d 868, 872-876 (10th Cir. 1992). The Tenth Circuit opinion did note that the constitutionality of the search was relevant because "the government will be barred from introducing evidence illegally seized in violation of the [F]ourth [A]mendment to prove a claim of forfeiture." *$149,442.43*, 965 F.2d at 872 (dicta). But that statement merely recognizes that the exclusionary rule applies in forfeiture cases. It does not suggest that recognizing the character of the *res* property is tantamount to introducing the *res* into evidence. Similarly, in the Second Circuit case, the court stated that the exclusionary rule applies in forfeiture proceedings and noted that its own exposition of the scope of that rule was "somewhat unclear." *$557,933.89*, 287 F.3d at 80. The court did not hold that the exclusionary rule requires a factfinder to ignore the identity of a *res*, nor did the court have occasion to do so. See *ibid.* (finding no Fourth Amendment violation to warrant exclusion of evidence).

In short, petitioner cites to no case that holds that an item obtained as a result of a defective search must be treated as a "featureless widget" for purposes of deciding whether untainted evidence shows that the item is

subject to forfeiture.[2] To the contrary, the language in the cited cases supports the rule applied below.[3]

3. Finally, review is unwarranted because this case would be a poor vehicle for deciding whether the *res* in a forfeiture proceeding must be considered a "featureless" widget if it was unlawfully seized. Petitioner's own claim to the *res*, which petitioner signed under penalty of perjury, asserts that petitioner is the "owner and possessor of the * * * currency" in question. Judicial Claim at 1 (Apr. 27, 2004); see Pet. App. 24 n.1. That sworn statement alone constitutes sufficient evidence to establish that the *res* is currency. Petitioner's answer similarly admits that the defendant *res* consists of "United States funds in the amount of $493,580.00," Compl. 2. Answer at 1. Moreover, petitioner failed to

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[2] The treatise upon which petitioner relies (Pet. 12-13) appears to address a question different than the one presented here. That treatise, like the court of appeals (Pet. App. 10), notes that there is a circuit conflict on whether a court may consider that the amount of an unlawfully seized currency *res* is unusually large, which would tend show its connection to unlawful activity. See Pet. 13 (citing David B. Smith, *Prosecution and Defense of Forfeiture Cases* § 10.05[8] (2007)). That question is not presently at issue because the court of appeals concluded that the size of the unlawfully seized funds could not be considered. Pet. App. 8-11.

[3] To the extent petitioner claims (Pet. 7, 11) that an intra-circuit conflict in the Ninth Circuit warrants this Court's review, he is mistaken. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). In any event, the decision cited by petitioner does not conflict with the decision below. Compare *United States* v. *$191,910*, 16 F.3d 1051, 1059-1065 (9th Cir. 1994) (affirming suppression of the *amount* of unlawfully seized currency as proof that the currency was subject to forfeiture), with Pet. App. 9-11, 22 (interpreting *$191,910* and agreeing that the amount of currency was inadmissible to show forfeitability).

contest the government's statement of facts as required by the local district court rules, Pet. App. 29, 32, and those uncontested facts provide "information about the defendant," *id.* at 35 n.2, including the fact that the defendant *res* consists of "United States funds" of a specified amount. See Gov't Am. Statement of Facts ¶ 1; see also Pet. App. 40 n.3 (finding statement of facts sufficiently supported by evidence). Petitioner's sworn claim, formal pleading, and failure to oppose the government's factual statement at summary judgment constitute a sufficient and independent basis for recognizing that the *res* in this case is, in fact, currency.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2008

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[4] The court of appeals did not disturb the district court's holding that the government's request for admissions would be deemed admitted because petitioner's blanket assertion of a Fifth Amendment privilege was an improper response under Rule 36. Pet. App. 40; see *id.* at 21 n.5. Because the facts deemed admitted by the district court form a sufficient evidentiary basis for the order of forfeiture, the evidentiary record as it comes to this Court further counsels against this Court's review.